

STATE OF CALIFORNIA

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January 12, 2007

Christine L. Harwell, Hearing Officer
Office of the Director - Legal Unit
320 West 4th Street, Suite 600
Los Angeles, CA 90013

Re: Public Works Case No. 2005-037
Off-site Testing and Inspection Services
Jurupa Unified School District — Glen Avon High School

Dear Ms. Harwell:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws, and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the off-site testing and inspection services performed by The Twining Laboratory, Inc. ("Twining") is not subject to prevailing wage requirements.

Facts

On September 4, 2002, Kern Steel Fabrication, Inc. ("KSF") entered into a contract with the Jurupa Unified School District ("District") to provide structural steel for the construction of Glen Avon High School ("Project") in Riverside.¹ It is undisputed that the Project is a public work. Under the terms of paragraph 2 of its contract, KSF agreed to:

[P]rovide and furnish all the labor, materials, necessary tools, expendable equipment, and all utility and transportation services as described in the complete contract and required to complete all work for: Bid#3/03L—Jurupa High School#3. Phase 1; Category 2—structural steel including, if so desired and ordered by the District, through major change orders requiring the performance of any or all Phase(s) of the Project as identified in the contract documents

KSF has been in business as a supplier of structural steel since 1978. Its sole facility is a steel fabrication shop at 627 Williams Street in Bakersfield. KSF supplies structural steel to private and public entities for use in the construction of a variety of structures. It has recently supplied structural steel for commercial building projects such as the Crossroads Business Center in Irvine, the Kaiser Permanente Phase II Project in Bakersfield, the United Airlines hangar in Oakland and the Brisbane Technology Park in Brisbane.

On February 3, 2003, Twining entered into a contract with District to provide testing and inspection services at KSF's facility. As described in its proposal, Twining's services included the following:

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¹Tilden-Coil Constructors, Inc. served as construction manager for the Project, apparently in lieu of a general

The DSA [Division of the State Architect] approved plans and specifications and references therein will be thoroughly reviewed prior [to] and during the structural steel fabrication. ...

Mill certifications will be used to identify all structural steel in accordance with the requirements of the project plans and specifications. ...

All welders proposed for the project will have their qualifications and welding procedures (prequalified and qualified) reviewed prior to steel fabrication. ...

Twining will provide daily handwritten reports upon leaving the project each day. These reports will be followed by a formal typed report every two weeks. The daily reports will indicate the work performed on a particular day by preferably a piece mark number of the structural steel member and the individuals performing the work. Partial and complete penetration welds will be non-destructively tested as required by the applicable code standards. All tests will be documented and reported under separate reports.

All accepted work will be marked in an acceptable manner so as to permit the project inspector-of-record and the field inspection firm verification that the fabricated structural steel member is acceptable for field erection.

In the event of a deficiency discrepancy, Kern Steel will be immediately notified so that the deficiency or discrepancy may be properly addressed or corrected. If the deficiency or discrepancy is not properly addressed or corrected before the steel member in question is to be shipped, the project inspector, the architect, the structural engineer, the owner and ultimately DSA will be notified. All deficiencies and discrepancies will be documented on the daily report as a matter of record.

None of Twining's services was performed at the Project site. All of the above tasks were performed at KSF's Bakersfield facility, which is located more than 100 miles from the Project site in Riverside.

On April 18, 2003, Twining sent a letter to District memorializing certain agreements regarding billing rates. The letter stated in part:

During several conversations ... leading to our revised proposal dated December 3, 2002, our special inspection services were estimated on a tentative schedule provided by Kern Steel based upon a non-prevailing hourly billing rate. The basis of our rate was that our special inspection services were to be provided off-site in a fabrication shop apart from the project site.

[O]ur services will continue to be compensated on a non-prevailing hourly billing rate as indicated in the contract as Exhibit C. However, based upon new or recent

judicial decisions, the Jurupa Unified School District is seeking a legal opinion on whether off-site special inspection services are subject to prevailing wage requirements established by the Director of Industrial Relations.

[I]n the event the legal opinion indicates that our off-site special inspectors are subject to prevailing wage requirements, our current non-prevailing wage hourly billing rate for a special inspector would be renegotiated to a prevailing hourly billing rate. ... All previous billings would be then adjusted for prevailing wage rate with our employees being compensated for prevailing wage.

Whether prevailing wage obligations attach to the testing and inspection services performed by Twining at KSF's Bakersfield facility is the subject matter of this determination.

Discussion

Labor Code section 1720(a)(1)² defines public works to include:

Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

Section 1771 generally requires the payment of prevailing wages to workers employed on public work. Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Finally, under section 1774 such contractors or subcontractors "shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract." Work falls within the scope of sections 1771, 1772 and 1774 when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." See *O. G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7.

It is undisputed that the Project, the construction of a high school in Riverside done under contract and paid for in whole or in part out of public funds, is a public work. The question presented here is whether the testing and inspection services performed by Twining employees at the KSF facility³ in Bakersfield was "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction" within the meaning sections 1771, 1772 and 1774.

Twining employees performed their work independent of the construction activities at the Project site. They worked entirely in the fabrication shop and never at the construction site. They had no

²Subsequent statutory references are to the Labor Code unless otherwise indicated.

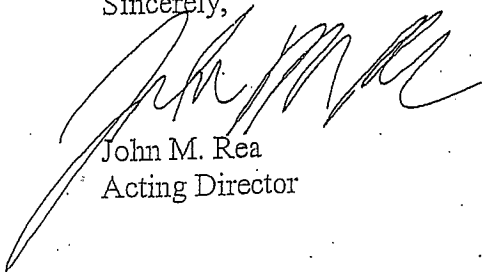
³The KSF facility is a general use facility. Therefore, unlike a dedicated yard or secondary public works site, the fabrication work performed at the KSF facility is not subject to prevailing wage requirements. See *O.G. Sansone Co.*

interaction with the construction workers, and they inspected and tested the structural steel at an entirely different place and time than the steel was erected. Once they determined a member to be satisfactory, that member could not be immediately incorporated in the construction project because it first had to be transported a distance of more than 100 miles. Under these circumstances, the off-site testing and inspection services performed by Twining employees was not an integrated aspect of the flow process of construction, and was not sufficiently functionally related to that process as to be done in the execution of the public work. It would be more accurate to say that is work is functionally related to the process of material fabrication.

Based on the foregoing and consistent with the analysis and outcome of past precedential public works coverage decisions applying the same Code sections,⁴ Twining employees performing off-site testing and inspection services were not employed in the execution of a contract for public work within the meaning of sections 1771, 1772 and 1774, and therefore Twining was not required to pay prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director

⁴Decisions in which the work in question was found not to be in the execution of a contract for public work include PW 2002-096, *Request for Proposals: Planting, Operation, Maintenance and Monitoring of Owens Lake Southern Zones Managed Vegetation Project* (December 16, 2005) (inspection, testing and monitoring work that occurs after the completion of the public work was not directly related to the prosecution of the public work and necessary for its completion); and PW 99-037, *Alameda Corridor Project, A&A Ready Mix Concrete and Robertson's Ready Mix Concrete* (April 10, 2000) (delivery of concrete mix was not an integrated aspect of and functionally related to construction work on the project). Decisions in which the work in question was found to be in the execution of a contract for public work include PW 2003-026, *Advisory Opinion on DSA Project Inspectors* (October 7, 2003) (project inspectors actively and continuously monitoring contractor's work through on-site physical presence whenever there was construction activity were a vital and integral part of construction projects); PW 2004-013, *Dry Creek Joint Elementary School District, Coyote Ridge Elementary School, On-site Heavy Equipment Upkeep* (December 16, 2005) (on-site heavy equipment upkeep by contractor's shop employees was directly related to the prosecution of the public work and necessary for its completion); and PW 2005-018, *Installation and Removal of Temporary Fencing and Power and Communications Facilities, Eastside High School, Antelope Valley Union High School District* (February 28, 2006) (removal of temporary fencing and power and communications facilities was performed as part of construction process). See also, PW 2004-023, *Prevailing Wage Rates, Richmond-San Rafael Bridge/Benicia-Martinez Bridge/San Francisco-Oakland Bay Bridge, California Department of Transportation* and PW 2003-046, *Public Works Coverage, West Mission Bay Drive Bridge Retrofit Project, City of San Diego* (January 23, 2006) (only towboat operators who haul materials from dedicated sites or who are involved in the immediate incorporation of materials into bridge projects were performing work functionally related to and integrated with the process of construction).